Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Cable Television Coiisumer Protection and Competition Act of 1992	)	
	)	MB Docket No. 07-29
Development of Competition and Diversity In Video Programming Distribution:	)	
Section 628(c)(5) of the Communications Act:	)	
Sunset of Exclusive Contract Prohibition	)	

REPLY COMMENTS OF THE WALT DISNEY COMPANY, CBS CORPORATION, FOX ENTERTAINMENT GROUP, INC., AND NBC UNIVERSAL, INC.

These reply comments ("Reply Comments") are submitted on behalf of The Walt Disney Company, CBS Corporation, Fox Entertainment Group, Inc., and NBC Universal, Inc. ('jointly "the Reply Commenters"). The Reply Coininenters are filing these Reply Comments only to respond to two specific issues raised in the comments filed in this proceeding. First, given the narrow antitrust basis for the program access rules and the increased competition in the delivery of video programming, arguments that the program access rules should be expanded to cover programming that is not vertically-integrated are without merit. Second, given the changes in the programming marketplace, the Commission should decline to adopt mandated arbitration.

I. There is No Factual or Legal Basis to Expand the Program Access Rules to Non-vertically Integrated Programmers.

Several commenters argue that the program access rules should be expanded to iiiclude lion-vertically integrated programming.[1] As an initial matter, the Commission lacks tlie legal authority to expand tlie program access rules in this manner.[2] By its very terms, Section 628 covers only programming in which a cable operator has "an attributable interest." Congress enacted the law because it was concerned that vertically integrated program suppliers had the incentive aiid ability to favor their affiliated cable operators over other multichannel video programming distributors ("MVPDs"). But independent programmers, of course, are economically motivated to distribute their content on as many platforms as possible. And negotiations leading to that distribution are clearly best left to the marketplace.

There simply is no basis to coiiclude that the rules should be expanded to programmers that are not vertically integrated with an MVPD. Indeed, whatever the arguments may be for leaving the current program access rules in place – argumeiits that are strongly rebutted on their merits in this rulemaking – any arguments for expanding the rules rest on even less firm ground. As the National Cable & Telecommunications Association ("NCTA") aptly addresses in its comments, the program access rules are based on the narrow antitrust concern that a vertically-integrated programmer might withhold programming in order to prevent or hinder competition to that programmer's

[1] See, e.g. comments of RCN Telecom Services, Inc. ("RCN Comments"), at 12-18; comments of National Rural Telecommunications Cooperative, at 7.
[2] See, e.g., Comments of the National Cable & Telecommunications Association ("NCTA Comments"), at 12-14.

MVPD operations.[3] It is axiomatic that this concern has always been and remains entirely non-existent for non-vertically integrated programming.

The NPRM properly focused on the two major competitive developments in the MVPD industry over the last ten years: the increase in DBS subscribers and the entry by AT&T, Verizon, and other telecommunications companies into the MVPD marketplace. There is much debate in the comments filed in this proceeding about the extent of competition that these factors have created, but one thing is clear – there is more competition today than ever before in tlie consumer video programming marketplace.[4] At such a time, it defies logic to impose additional regulatory burdens that were not deemed necessary in 1992, when the program access restrictions were first crafted and Congress and the FCC were seeking to encourage the very competition that exists today.

II. <u>The Commission Should Not Impose Arbitration or Standstill Agreements.</u>

Several commenters have argued that the Commission should impose arbitration as a procedural "remedy" for program access disputes.' The Reply Commenters support NCTA's position that there is no need for such action.[6] Notwithstanding the Commission's recent imposition of arbitration in the limited context of merger approvals, the Commission should refrain from imposing binding arbitration as a catch-all solution for the following reasons.

First, there is no problem in need of solution by arbitration. As discussed above and extensively in comments filed in this proceeding, the consumer video marketplace is

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[3] See NCTA Comments, at i, 2-3.
[4] See, e.g., NCTA Comments, at 4 (noting that cable's share of MVPD customers has "diminished to less than 67%").
[5] See, e.g., Coininents of Broadband Service Providers Association, at 7-14 ("Broadband Comments"); RCN Comments, at 18-21; Coinineiits of National Rural Telecommunications Cooperative, at 7.
[6] See NCTA Comments, at 9-14 (explaining that modified procedures are unnecessary and/or unlawful).

more competitive today than it has ever been, with tlie increase in subscribership of DBS and now the telephone companies' MVPD offerings.[7] It follows that the corresponding market for programming purchases by distributors similarly is inore competitive than it has ever been. In light of such changes, there can be no substantive or antitrust argument for forced intrusions into the negotiations between MVPDs and programmers, either in the form of arbitration or in the form of so-called "standstill" agreements.[8]

Second, the Commission already has sufficient and effective remedies in place to resolve program access disputes. The overlay of an additional layer of process in the form of arbitration would only serve to prolong, iiot shorten, the Commission's deliberative process. Moreover, the Cominissioii would be forced to retain jurisdiction and decision-malting authority over the matter because, as NCTA notes, the FCC has no authority to delegate its statutory obligation to resolve program access complaints.[9] Further, tlie ability of a negotiating party to turn to arbitration instead of remaining at the negotiating table would inevitably result in more, not fewer, disputes being brought to the Commission, thus forcing the Conimissioii to devote more resources to address private contractual disputes. Given the relatively small number of program access disputes that have ever been filed, and the increasingly competitive marketplace for programming, there simply is no justification for adding such intrusive and resource-intensive procedural mechanisms to tlie existing dispute resolution procedures.

[7] See, e.g., NCTA Comments, at 4-5.
[8] Several coininenters argue that "standstill" agreements should be imposed, which would require programmers to continue to provide prograinining during negotiations. See, e.g., Comments of United States Telecom Association, at 27-29; Broadband Comments, at 14-16; RCN Comments, at 18-21. Such obligations would vastly tip the balance between the parties, and thereby undermine tlie goal of expeditious market resolution of programming negotiations.
[9] NCTA Comments, at 12.

III. Conclusion.

The Reply Comineiiters respectfully request that tlie Commission decline to expand tlie program access rules to lion-vertically integrated programmers and that the Commission decline to adopt mandated arbitration or standstill agreements.

Respectfully submitted,

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April 16,2007